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SUPREME COURT, U.S.

No. 79-5932

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

JOHN DOE AND JANE ROE

v.

STATE OF DELAWARE

On Appeal From The Supreme Court of Delaware

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979

No. _____

JOHN DOE AND JANE ROE

v.

STATE OF DELAWARE

On Appeal From the Supreme Court of Delaware

JURISDICTIONAL STATEMENT

Appellants John Doe and Jane Roe appeal from the judgment of the Supreme Court of Delaware entered August 24, 1979, affirming the permanent termination of their relationship with their five children.*/

OPINIONS BELOW

The opinion of the Supreme Court of Delaware, dated August 24, 1979, is attached to this jurisdictional statement as Appendix A.**/ Prior opinions in the same proceeding include the oral opinion of the Superior Court, delivered September 12, 1975, the order of the Delaware Supreme Court, dated September 28, 1976, and the letter opinion of the Superior Court, dated December 30, 1976,

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*/ Throughout this jurisdictional statement and in the appended documents, the real names of the parents have been changed to John Doe and Jane Roe and the names of their children have been altered in order to maintain confidentiality. A separate set of all papers reprinted in the Appendix with the original names of the parents and children left unchanged has been filed with the Clerk of this Court, with the request that confidentiality be maintained. Under Delaware law, the proceedings are confidential. 13 Del. Code §§ 1107(e), 1111.

**/ Excerpts from the Delaware Supreme Court opinion are reported in Matter of Five Minor Children, 407 A.2d 198 (Del. 1979), which is also included in Appendix A at pp. 16a-19a.

which are attached, respectively, as Appendices B, C, and D. None of the four opinions is officially reported.

JURISDICTION

The proceedings below were commenced in the Delaware Superior Court pursuant to 13 Del. Code §§ 1101-13 to terminate parental rights of the appellants in their five minor children. Following the decision of the Delaware Supreme Court on August 24, 1979 (Appendix A), a timely motion for re-argument was filed and was subsequently denied by an order of the Delaware Supreme Court entered on October 19, 1979, which is attached as Appendix E. The judgment of the Delaware Supreme Court was also entered on October 19, 1979, and is attached as Appendix F. A notice of appeal in this case was filed in the Delaware Supreme Court on January 7, 1980, and is attached as Appendix G.*/ Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the provisions of 13 Del. Code §§ 1101-13 are set forth in Appendix H.

QUESTIONS PRESENTED**/

1. Is the Delaware statute, which provides for the permanent termination of the parent-child relationship where the parent is "not fitted," unconstitutionally vague and indefinite in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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*/ A notice of appeal in identical form, also attached as Appendix G, was filed in the Delaware Superior Court on the same date, in the event that that Court should now be deemed the Court "possessed of the record." Sup. Ct. R. 10(3).

**/ The first question presented is properly presented by appeal and the second and third questions are therefore properly included in the jurisdictional statement. Prudential Ins. Co. v. Cheek, 259 U.S. 530, 547 (1922).

2. In light of the protected nature of the family relationship under decisions of this Court, does the Due Process Clause and this Court's decision in Addington v. Texas, 99 S. Ct. 1804 (1979), preclude the termination of the parent-child relationship based upon a mere "preponderance of the evidence"?

3. Under the Due Process Clause, must the state demonstrate a compelling state interest before terminating the parent-child relationship?

STATEMENT OF FACTS

Delaware, like many other states, provides a statutory procedure for termination of the parent-child relationship, commonly known as a "TPR" proceeding.*/ The TPR remedy is different from, and far more drastic than, a custody proceeding that transfers control of the child on a temporary or indefinite basis. The TPR remedy, by contrast, permanently terminates all legal rights of the parent or parents affected. In practical terms, it excludes the parent or parents from any further contact or relationship with the child, regardless of improvement or rehabilitation of the parent.

On July 2, 1975, the Division of Social Services of the Delaware Department of Health and Social Services (the "Division") filed a TPR petition in the Delaware Superior Court against John Doe and Jane Roe, the natural parents of five young children whose ages then ranged from 8 months to

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*/ "TPR" is an acronym for "termination of parental rights." 13 Del. Code §§ 1101-13. The entire chapter is reprinted in Appendix H to this petition.

4 years. The statutory "ground" asserted in the TPR petition was that set forth in 13 Del. Code § 1103(4), which reads in its entirety:

> "The parent or parents of any such child, or any person or persons or organization holding parental rights over such child are not fitted to continue to exercise parental rights."

Nothing in the statute provides any further guidance -- by definition, requirement, standards or otherwise -- as to what constitutes unfitness under this provision.*/

The TPR petition culminated bitter disputes between the Doe family and the Division which had begun several years before, when in 1972 Mr. Doe voluntarily and temporarily placed his then two children with the Division because he had lost his job and was not eligible for state assistance.**/ Although the two children were returned to him several months later, the Division subsequently instigated two separate actions against Mr. Doe before filing the TPR proceeding.

First, in January 1974, the Division caused to be brought an unsuccessful prosecution against Mr. Doe for sexually assaulting his oldest child. At trial, Mr. Doe flatly denied the charges,***/ and the alleged witnesses either failed to appear or testified that they had never

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*/ Section 1103(4) is the basic subsection governing involuntary termination; other subsections of Section 1103 deal with voluntary relinquishment, abandonment, mental incompetence and death of the parents. The statute is treated under state law as setting forth the grounds for termination, with the further statutory condition (13 Del. Code § 1108(a)) that termination also be "in the best interests of the child."

**/ Tr. 62, 67-68, 105, Dec. 7, 1976. References to "Tr." are to the TPR hearing transcripts.

***/ See Tr. 108-09, Dec. 7, 1976. As he testified later in the TPR case, "I put my tongue on the top of my daughter's lip and her nose playing." Tr. 75, Dec. 7, 1976. His daughter was then two years old.

made the principal allegations attributed to them by the Division. See Tr. 150, Dec. 7, 1976. While acquitting Mr. Doe of assault, the court convicted Mr. Doe of the misdemeanor of offensive touching -- with which he had not been charged -- and placed him on probation.

Second, shortly after the birth of their youngest, twin children, the Division in January 1975 initiated a criminal charge of incest against John Doe and Jane Roe on the ground that they were half brother and sister. Although the Division had known about this relationship since 1972 and assured the parents that it did not disqualify them for custody (Tr. 163, Dec. 7, 1976), the incest charge was actually filed in order to obtain control of the children.*/ After a trial in which the parents were unrepresented by counsel, they were convicted and placed on probation. Tr. 91, Dec. 7, 1976.

Following the incest conviction, the TPR proceeding previously described was commenced in July 1975. A.2a.**/

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*/ The notes taken by the Division representative who met with the state deputy attorney general read in pertinent part as follows:

> "[The DAG] said that the only way DSS could get a TPR was if DSS also had custody of the twins, because we can't prove the [parents'] unfitness if there are children in the home. Therefore, it was decided that [the DAG] would charge both [parents] with the criminal charge of incest on February 4, 1975. Then, DSS will petition for custody of the twins. The TPR for all of the three older children will follow pending the Court action over the criminal charges of incest." Parents' Trial Exhibit 21.

**/ At this stage, custody of all of the Doe children resided in the Division: the eldest had been taken incident to the first conviction (A.4a) and the youngest had been taken when both parents were jailed before trial incident to the incest charge. Id.; Tr. 112, Dec. 7, 1976.

After a truncated hearing, the Superior Court ruled summarily on September 12, 1975, "that the incestuous relationship between the father and the mother is sufficient in and of itself for termination of parental rights." A.5b. On review, the Delaware Supreme Court remanded the proceeding (A.1c) on the grounds that the record did not contain an adjudication that the termination of parental rights was also "in the best interests" of the children involved, as required under 13 Del. Code § 1108. See p. 4 n.*, above. There followed the full-scale TPR proceeding that gives rise to this appeal.

On December 6, 1976, proceedings in the remanded TPR case commenced before the same judge who had previously issued the summary opinion. At the outset of the proceedings, counsel for John Doe and Jane Roe challenged the TPR statute on the constitutional grounds asserted in this case.*/ The Division then presented its case beginning with the introduction in evidence of a "social report" prepared by the Division. Tr. 14-15, Dec. 6, 1976. This report comprised a lengthy recitation of the "facts" respecting the family compiled from Division records and other sources by a "writer who has no personal knowledge of the facts and circumstances." Social report, p.1.

The Division then presented witnesses, including a pair of psychiatrists who had never examined either the Doe parents or the children. Tr. 11, 39, Dec. 6, 1976;

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*/ See Tr. 6-10, Dec. 6, 1976, and Tr. 276, Dec. 20, 1976, reprinted as Appendix I. The claims were renewed in the Delaware Supreme Court in appellants' opening brief (pp. 8-36, 63-75), reply brief (pp. 1-17), and motion for reargument (pp. 1-12). See also decision, August 24, 1979, pp. 5-15 (A.5a-15a).

Tr. 176, Dec. 7, 1976. Instead, assuming the facts stated in the social report to be true, they concluded that the parents lacked "nurturing" capacity (Tr. 20, Dec. 6, 1976) and were not "capable of adequately raising children." Tr. 182, Dec. 7, 1976. Other Division evidence showed that John Doe had had an episode of drunkenness several years before,*/ and that Mr. Doe had moved his family repeatedly as he changed jobs. No independent evidence was introduced to show Jane Roe's unfitness.

For John Doe and Jane Roe, the evidence showed that the Division itself did not regard the half-sibling relationship as disqualifying appellants as parents;**/ that the eldest child had been moved through nine foster homes and was suffering from these changes (Tr. 241-45, Dec. 8, 1976); and that John Doe and Jane Roe had for the prior year maintained a stable relationship including employment of both parents. Tr. 113, Dec. 7, 1976; Tr. 389-92, Dec. 21, 1976. John Doe and Jane Roe's employer testified that they were reliable and trustworthy employees. Id. A psychologist, in charge of psychological services for the Division of Public Health, testified that their parental rights

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*/ John Doe explained that the episode had followed the surrender of his two eldest children to the Division at a time when he was out of work and was unable to receive welfare and had resulted from his anxiety at the loss of his children. Tr. 105-06, Dec. 7, 1976. His current employer testified at the TPR proceeding that Mr. Doe, employed in a facility where liquor was available, was invariably sober. Tr. 389-92, Dec. 21, 1976.

**/ Indeed, the Division's own social-worker representative had assured the parents that their relationship itself was not disqualifying (Tr. 163, Dec. 7, 1976), and its psychiatric witnesses either disclaimed reliance on the relationship (Tr. 32, Dec. 6, 1976) or essentially ignored it (Tr. 176-200, Dec. 7, 1976) in their testimony.

should not be terminated and that his own interview*/ had impressed him that there was a "good relationship" between the parents and a "strong desire to have their children back." Tr. 457, Dec. 21, 1976.**/

A week later, the Superior Court issued a three-page letter finding that the parents were "incapable of providing proper care" and determining that the best interests of the children would be served by terminating parental rights. A.3d. The court described the parents' "pattern of living" as reflecting moves from job to job and "frequent resort to the obtaining of public financial assistance in order for them and their children to exist." Id. These factors, together with "the moral atmosphere, the incestuous relationship between the parents, and the past conviction of [John Doe]" were cited by the court, without any further explanation of how or why they demonstrated the unfitness of the parents or the best interests of the children. Id. At the same time, the court found that during the past year the parents' "employment record and place of living has remained stable" (id.), but the court provided no explanation of why these circumstances were discounted or disregarded.

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*/ The witness had examined and tested both parents and had also examined two of the Doe children; and a psychologist on his staff had examined a third. Tr. 449, 461, Dec. 21, 1976.

**/ When custody of the children was taken from the parents, the court provided that they would be entitled to visit their children. However, the Division refused to allow such visits and successfully resisted an application by John Doe to obtain visitation rights. See Parents Trial Exhibits 15, 18.

On review, the Delaware Supreme Court affirmed. A.15a. It found that the statutory phrase "not fitted" meant "unfitted for parental duties" and was not unconstitutionally vague, indefinite and overbroad. A.7a. Rejecting a higher burden of proof than preponderance of the evidence, the court distinguished Addington v. Texas, 99 S. Ct. 1804 (1979) (requiring a higher standard for civil commitment) on the ground that termination of parental rights "is a civil proceeding, not a penal one . . . ." A.10a. Turning to the evidence,*/ the Delaware Supreme Court then decided in substance that (1) the asserted incest rendered the parents unfit and (2) the multiple jobs and moves and the prior convictions established that the best interests of the children would be served by termination. A.12a-15a. Finally, the opinion criticized the trial court's exclusion of evidence concerning the inadequacy of the foster home placement of the Doe children and lack of planning for their future, but it deemed the evidentiary rulings not to be reversible error. A.15a.

A timely motion for re-argument was filed on September 5, 1979, renewing the constitutional attacks based on the vagueness of the statute, the inadequate standard of proof and substantive due process. On October 19, 1979, the Delaware Supreme Court denied without opinion the motion for re-argument. A.1e.

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*/ The Delaware Supreme Court found that it was improper to admit the social report in evidence "in light of the fundamental parental rights at stake" (A.12a), but it concluded that the facts relied on by the Superior Court were established by independent evidence. Id. Since the Division's own experts testified on the premise that the entire social report was true, the Delaware Supreme Court assumed -- without any basis -- that the Superior Court was not influenced by the expert testimony and that the testimony was unnecessary to the results.

THE QUESTIONS ARE SUBSTANTIAL

I. THE DELAWARE TPR STATUTE IS UNCONSTITUTIONALLY VAGUE AND INDEFINITE.

Rejecting the parents' challenge, the Delaware Supreme Court sustained the "fitness" provision of 13 Del. Code § 1103(4) against charges of unconstitutional vagueness. Whether that statute satisfies due process requirements is a substantial constitutional question that deserves plenary review in light of the precious nature of the rights and relationships at stake, the direct conflict between the opinion below and rulings by several other courts, both federal and state, and the pervasiveness of the challenged language in TPR statutes of other states.

It is well established that parents' relationship with their children is one of the liberties to which due process must be accorded. Quilloin v. Walcott, 434 U.S. 246, 255 (1978). Indeed, this Court repeatedly has struck down state attempts to violate the integrity of the family,*/ for:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . .. And it is in recognition of this that [our] decisions have respected the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

Accordingly, when regulating or curtailing the parent-child relationship, the state is obligated to promulgate a standard

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*/ Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Moore v. East Cleveland, 431 U.S. 494 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

of "a greater degree of specificity than in other contexts," a standard proportionate to the preciousness of the interests at stake. Smith v. Goguen, 415 U.S. 566, 573 (1974).*/

It is difficult to imagine a statutory standard more vague than that of the Delaware TPR statute: parental rights shall be terminated if the parents "are not fitted to continue to exercise parental rights." 13 Del. Code § 1103(4). The statute -- whose language is almost circular -- offers no clue as to what constitutes unfitness, forcing courts, state officials and parents to guess at its meaning. Because meaningful and precise criteria have been incorporated into other states' TPR statutes (see pp. 14-15, below), the vagueness of Delaware's standard cannot be justified as inherently necessary.

The companion "standard" for terminations of parental rights under the Delaware Code, "in the best interests of the child" (see 13 Del. Code § 1108(a)), is equally vague. In fact, this Court recently characterized as "vague" an identical standard used in child custody proceedings. Smith v. Organization of Foster Families, 431 U.S. 816, 835 n.35 (1977). No criteria are offered by the Delaware statute for assessing a child's "best interests." Hence, both of the standards used in Delaware TPR proceedings present substantial constitutional questions warranting plenary consideration by this Court.

It is not surprising that TPR statutes employing essentially similar language have been held invalid by two

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*/ This Court has held that the standard of specificity is not relaxed for statutes "adopted for the salutory purpose of protecting children." Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 689 (1968).

federal courts. Thus, in Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976), the offending language authorized termination of parental rights of those whose homes were "unfit" and "improper." Recognizing the circular and opaque character of the statutory standard, the court held Alabama's TPR statute unconstitutionally vague. Similarly, the Iowa TPR statute, focusing on the terms "unfit" and "necessary parental care and protection," was invalidated in Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd on other grounds, 545 F.2d 1137 (8th Cir. 1976) (per curiam).*/ In addition to these federal court decisions, at least one state supreme court has invalidated language virtually identical to that upheld below. Davis v. Smith, 583 S.W.2d 37 (Ark. 1979) ("parents . . . unable to provide a proper home").

Although it has never expressly addressed the sufficiency of a TPR statute, this Court too has consistently invalidated statutory standards indistinguishable from that challenged here. For example, the terms "acceptable," "proper," and "not suited for young persons," were found unconstitutionally vague in Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968) (invalidating scheme for classifying motion pictures). See also Gelling v. Texas, 343 U.S. 960 (1952) ("such character as to be prejudicial to the best interests of the people").

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*/ In Alsager, the Court of Appeals admonished:

> "Both the vagueness and overbreadth attacks upon these provisions are serious ones. By declining to affirm on these grounds, however, we afford the Iowa courts an additional opportunity to give the statutory provisions a plainly desirable limiting construction." 545 F.2d at 1138.

The Delaware TPR statute entails each of the basic vices against which the vagueness doctrine is directed. The standard "not fitted" fails "to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Accord, Roe v. Conn, supra.*/ Even more important, the statutory vagueness authorizes enforcement of the drastic TPR remedy "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, supra, 408 U.S. at 108. Accord, Alsager v. District Court, supra.**/

The TPR proceedings in this case illustrate these vices. Notwithstanding the drastic nature of the remedy imposed, the Superior Court offers no link whatsoever between its "findings" and the statutory standard. See p.8, above. Although several incidents of the Doe family history are described in its opinion, the court fails to indicate which of those incidents were determinative and how or why the determinative incidents demonstrated "unfitness." Indeed, the

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*/ The court stated:

> "Obviously [what is "unfit" and "improper"] is a question about which men and women of ordinary intelligence would greatly disagree. Their answers would vary in large measure in relation to their differing social, ethical, and religious views." 417 F. Supp. at 780.

**/ In Alsager, the court explained:

> "[A]rbitrary and discriminatory parental terminations are inevitable . . . . The termination of the parent-child relationship may turn upon which state officials are involved in the case, rather than upon explicit standards reflecting legislative intent. This danger is especially grave in the highly subjective context of determining an approved mode of child-rearing." 406 F. Supp. at 18.

Division and its experts rejected one of the incidents mentioned by the Superior Court and emphasized by the Delaware Supreme Court -- the parents' half-sibling relationship -- as a determinant of unfitness. See p. 7 n.**, above.

Despite the imprecision of the statutory language, the Delaware courts have refused to offer a narrowing or clarifying construction. In fact, rather than clarifying the statute, the court below extended the tautological definition offered by the legislature: "As to petitions for terminations of parental rights, the words 'not fitted' mean 'unfitted for parental duties.'" A.7a, quoting In re Dingee, 328 A.2d 139, 140 (Del. 1974). Coupled with the confidential nature of TPR proceedings themselves (13 Del. Code §§ 1107(e), 1111), the absence of authoritative judicial construction ensures that the vices entailed by the statute's vagueness will be realized.

That these vices are not inherent in the problem addressed by TPR statutes is demonstrated by the Michigan child custody statute, which offers explicit guidance as to the meaning of its statutory standard:

> "Best interests of the child" means the sum total of the following factors to be considered, evaluated and determined by the court:
>
> (a) The love, affection and other emotional ties existing between the competing parties and the child.
>
> (b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the education and raising of the child in its religion or creed, if any.
>
> (c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other materials needs.

> (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
> (e) The permanence, as a family unit, of the existing or proposed custodial home.
> (f) The moral fitness of the competing parties.
> (g) The mental and physical health of the competing parties.
> (h) The home, school and community record of the child.
> (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.
> (j) Any other factor considered by the court to be relevant to a particular child custody dispute. Mich. Comp. Laws Ann. § 722.23 (Supp. 1976). */

Whatever criteria a state may choose to select, there is clearly an opportunity to devise "explicit standards reflecting legislative intent" (Alsager v. District Court, supra, 406 F. Supp. at 18) which Delaware cannot constitutionally ignore.

Although TPR statutes can be made more specific, few of the fifty state TPR statutes offer guidance for their application; in fact, many have language virtually identical to that challenged here. **/ Accordingly, appellants' vagueness challenge to the Delaware statute has broad applicability. That factor, the statute's extraordinary vagueness, the precious quality of the family relationships terminated by the statutory remedy, and the underlying conflict on this precise issue between Delaware and the Federal courts all demonstrate that this appeal presents a substantial question warranting plenary review.

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*/ See also Ill. Rev. Stat. ch. 40 § 1501(1)(D) (defining "unfit person").

**/ E.g., Ore. Rev. Stat. § 419.523(2) ("unfit"); Mass. Gen. Laws Ann. ch. 210 § 3(b) ("best interests of the child").

II. IT IS UNCONSTITUTIONAL TO TERMINATE PARENTAL RIGHTS BASED ON A MERE PREPONDERANCE OF THE EVIDENCE.

In the courts below, appellants argued on constitutional grounds that termination of parental rights must be based on more than a mere preponderance of the evidence, and the Delaware Supreme Court explicitly rejected this contention. This case thus raises the question whether TPR proceedings -- like civil commitment, juvenile delinquency adjudication, denaturalization and deportation cases -- must employ a proof standard more stringent than a mere preponderance of the evidence. A number of lower federal and state courts have answered this question affirmatively, in direct conflict with the Delaware Supreme Court.

A substantial constitutional question is clearly presented. Less than a year ago, this Court unanimously held that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." Addington v. Texas, 99 S. Ct. 1804, 1810 (1979). Previously, this Court had held that "clear, unequivocal and convincing" evidence is required in cases of denaturalization, expatriation and deportation.*/ The preponderance of the evidence standard has also been found unconstitutional

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*/ Woodby v. INS, 385 U.S. 276 (1966); Chaunt v. United States, 364 U.S. 350 (1960); Nishikawa v. Dulles, 356 U.S. 129 (1958); Gonzales v. Landon, 350 U.S. 920 (1955); and Schneiderman v. United States, 320 U.S. 118 (1943).

in juvenile delinquency adjudications (In re Winship, 397 U.S. 358 (1970)), and the Court has also required a higher standard of proof in libel cases where First Amendment rights were at stake.*/

In Addington, this Court emphasized that the state's action involved "a significant deprivation of liberty" invoking due process protection. 99 S.Ct. at 1809. No lesser liberty is involved in TPR proceedings. In Meyer v. Nebraska, 262 U.S. 390, 399 (1923), this Court stated that the liberty protected by the Fourteenth Amendment included the right "to marry, establish a home and bring up children, a privilege long recognized at common law as essential to the orderly pursuit of happiness by free men." See also pp. 10-11, above. For most couples, their children are their most important shared purpose and interest; and the permanent severance of that family relationship involves a "deprivation of liberty" at least as significant as a temporary isolation involved in Addington and Winship or the relocation required where an individual is denaturalized or deported.**/

In requiring a higher standard of proof, this Court has also emphasized as a matter of "paramount importance" the stigma resulting from the state's action. In re Winship supra, 397 U.S. at 374. In Addington the Court was concerned

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*/ In Rosenbloom v. Metromedia, 403 U.S. 29 (1971), the higher standard was required for findings of knowledge or wilful disregard which, if established, eliminated protection available under the First Amendment.

**/ If fact, one of the reasons given in Woodby requiring a higher standard of proof before aliens could be deported was that many aliens had established strong family, social and economic ties to this country. 385 U.S. at 286.

that the "adverse social consequences" of civil commitment could have "very significant impact on the individual." 99 S.Ct. at 1809. Yet the TPR determination in this case brands the parents "unfit" to raise their own children; and no stigma is more serious than the inevitable knowledge of neighbors and friends that the authorities have taken away one's children. However other societies may function, ours maintains a deeply rooted presumption that children should be raised by their parents. See Prince v. Massachusetts, supra (quoted p. 10, above). In this case, the state is not purporting merely to regulate the relationship between parent and child (e.g., by requiring public education or vaccinations) but to terminate it altogether and permanently. In such a situation "the risk of error" is not to be "share[d] equally" (Addington v. Texas, supra, 99 S.Ct. at 1808); a "bare" preponderance of the evidence is not sufficient to justify the termination of parental rights. Cf. Chaunt v. United States, supra, 364 U.S. at 353.

The facts of this case underscore the importance of the burden of proof. Although the trial court emphasized the parents' frequent moves and job changes and their resort to public assistance, it conceded that the parents' "employment record and place of living has remained stable" in the past year. A.3d. Similarly, the trial court seemingly relied on the parents' half-sibling relationship, but the state's own principal witnesses discounted or virtually ignored this charge as a basis for termination. See p. 7 n.**, above. No one can say that the result would have been the

same if the ultimate findings of "unfitness" and "best interests" had to be established with a higher degree of certainty.

At least five different courts have held that due process requires more than a preponderance of evidence for the termination of parental rights. These include two lower federal courts,*/ and three state courts.**/ However, there are a number of other states that permit the preponderance standard.***/ The need for resolution by this Court is finally supported by the fact that the burden of proof is relevant in every contested TPR proceeding, of which there are literally thousands every year.

III. DUE PROCESS FORBIDS TERMINATION FOR LACK OF A COMPELLING STATE INTEREST.

The final issue presented by this appeal is whether the conduct charged can, consistent with the Constitution, justify the termination of parental rights. In this case, there is no finding that either the asserted parental relationship or any of the other circumstances found has caused the children any injury whatever. Accordingly, a substantial constitutional question is presented under the Due Process Clause by the absence of any compelling state interest to justify the severance of protected parental rights.

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*/ Sims v. State Dept. of Public Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977) (three-judge district court), rev'd on procedural grounds, 99 S.Ct. 2371 (1979); Alsager v. District Court, 406 F. Supp. 10, 25 (S.D. Iowa 1975), aff'd on other grounds, 545 F.2d 1137 (8th Cir. 1976).

**/ Matter of C.L.T., 597 P.2d 518, 526 (Alaska 1979); Matter of Welfare of Rosenbloom, 266 N.W.2d 888, 889-90 (Minn. 1978); In re Heidi T., 151 Cal. Rep. 263 (1978).

***/ E.g., In the Matter of K.M.S., 552 P.2d 578 (Ore. 1976); In the Matter of R.E.W., 545 S.W.2d 573 (Tex. 1976).

It is beyond dispute that the "liberty" protected by the Fourteenth Amendment to establish a family and rear children (see pp. 10-11, above) is afforded "both substantive and procedural protection." Smith v. Organization of Foster Families, 431 U.S. 816, 842 (1977) (footnotes omitted). Where so basic and precious a human right is concerned, permanent infringement of that right must be justified by a compelling state interest; and the infringement must be rationally and necessarily related to the interest evoked to outweigh it.*/ This Court has committed itself to make a "critical examination" of the state interest advanced to justify the invasion (Zablocki v. Redhail, 434 U.S. 374, 383 (1978)) and stressed that when the state undertakes an "intrusive regulation of the family, . . . the usual judicial deference to the legislature is inappropriate." Moore v. East Cleveland, 431 U.S. 494, 499 (1977).

The only plausible state interest in this case is the protection of the children from harm, but there was no showing that the children had suffered or would suffer harm from the conduct asserted. In finding the parents unfit, the Delaware Supreme Court rested directly upon the parents' asserted incest, but no showing was made that the existing children had or would suffer any harm whatever from remaining in the custody of parents linked by a half-sibling relationship. For children already born -- the only ones involved in this

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*/ Roe v. Wade, 410 U.S. 113, 152, 155-56 (1973); Dunn v. Blumstein, 405 U.S. 330, 335 (1972); Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Bates v. Little Rock, 361 U.S. 516, 525 (1960).

case*/ -- the genetic dangers of inbreeding were either realized or not at the time the children were born.**/ As for future harm to the existing children, there was no testimony that the parents' relationship as such rendered them unable to provide ordinary care to their children. See p. 7 n.**, above.

The other principal circumstance relied on by the courts below was the frequency of the parents' relocations, job changes, and welfare applications. Yet, Americans are notoriously mobile, and the need for welfare assistance afflicts vast numbers of Americans at different times. Certainly such facts create no basis for presuming injury to the children, let alone injury so substantial as to justify permanently terminating the relationship.***/ In fact, the lower court specifically found that "during the past year while these proceedings for termination of parental rights have been pending, [the parents'] employment record and place of living has remained stable." A.3d.

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*/ At the instance of the Family Court, both John Doe and Jane Roe underwent medical procedures that prevent the bearing of any additional children. See Tr. 375-79, Dec. 20, 1976.

**/ In fact, the testimony concerning the mental abilities and potential of the children strongly indicated that no significant harm had occurred. Tr. 237-240, Dec. 8, 1976.

***/ See Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), and Stanley v. Illinois, 405 U.S. 645 (1972), disallowing conclusive presumptions imparing child-rearing and family relationships.

This case does not present any issue of fine appraisal or close weighing: there is simply no demonstration of any significant past or imminent harm to any of the children from continued parental care. Here, the state has taken the ultimate action to sever family ties by a permanent severance of the parents from five young children. If the decree stands, the parents will not even have a legal right to visit their children, and the children may be adopted by others or shuttled from foster home to foster home. Yet no harm to the children has been shown and, accordingly, no compelling state interest exists to justify the state's action.*/

The requirement of a compelling state interest, ignored by the Delaware Supreme Court, has been acknowledged by the lower federal courts. Thus, in Roe v. Conn, supra, 417 F. Supp. at 779, a three-judge District Court struck down a statute that permitted removal of child from "an unfit or improper home," saying:

> "States . . . may abrogate [parental] rights only to advance a compelling state interest and pursuant to a narrowly drawn statute restricted to achieve only the legitimate objective . . .. The State's interest, however, would become 'compelling' enough to sever entirely the parent child relationship only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing."

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*/ Certainly, deterrence of the parents' relationship is no justification. Cf. A.12a-13a. Deprivation of children as a form of punishment would manifestly be both "cruel and unusual." See generally Trop v. Dulles, 356 U.S. 86 (1958).

Other federal courts have followed the same approach.*/ In reaching its conclusion, the court in Roe v. Conn relied directly upon "the long line of Supreme Court cases" affirming the "fundamental right to family integrity protected by the Fourteenth Amendment . . .." 417 F. Supp. at 777.

This Court has not addressed the constitutional substantive standard for terminating parental rights,**/ but it has intervened vigorously over the course of many years to protect the family relationship. It has protected the right of parents to conceive children, to direct their education, and to house the family together, against constraints far less severe.***/ It is implicit in these decisions that a showing of some legitimate and compelling state interest is also required before a family relationship can be involuntarily destroyed. The question in this case -- whether a compelling state interest is required to justify termination of parental rights -- is "a federal question of substance" decided below "in a way probably not in accord with applicable decisions of this [C]ourt." Sup. Ct. R. 16.

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*/ E.g., Alsager v. District Court, 545 F.2d 1137 (8th Cir. 1976); Sims v. State Department of Public Welfare, 438 F. Supp. 1179 (S.D. Texas 1977) (three-judge district court), rev'd on procedural grounds, 99 S.Ct. 2371 (1979).

**/ Nevertheless, to the extent the Court has discussed the matter, its language points directly toward the requirement of a compelling state interest. See, e.g., Stanley v. Illinois, 405 U.S. 645, 651 (1972); Smith v. Organization of Foster Families, 431 U.S. 816, 863 (1977) (Stewart, J., concurring).

***/ Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Moore v. East Cleveland, 431 U.S. 494, 499 (1977).

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction and set this case for plenary briefing and argument.

Respectfully submitted,

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